Supreme Court of the United States.

No. 263.—October Term, 1902.

The Mutual Reserve Fund Life Association, Appellant, vs. James S. Phelps and Fidelity Trust and Safety Vault Company.	Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

[May 18, 1903.]

Section 631, Kentucky statutes, 1899, (Laws 1893, chap. 171, sec. 94) reads as follows:

"Sec. 631. Before authority is granted to any foreign insurance company to do business in this State, it must file with the commissioner a resolution adopted by its board of directors consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

On May 10, 1893, the appellant, The Mutual Reserve Fund Life Association, hereinafter called the association, acting under said section, by resolution of its board of directors, consented that the insurance commissioner of Kentucky should be authorized to receive service of process in any action brought or pending in Kentucky, and also that like valid service of process might be made upon every agent then or thereafter acting for it in Kentucky.

On October 10, 1899, the insurance commissioner cancelled the license which had theretofore been issued to the association, and gave it notice that from and after that date all authority granted by his department to it, and all licenses issued to the agents of the association to do business in the State of Kentucky, were revoked. And from and after that date the association had no agent or agents in the State of Kentucky and did no new business whatever in the State, but at one time, for the convenience of the holders of certificates residing in Jefferson County, permitted them

to remit dues and assessments through the Western Bank, located in the city of Louisville.

On February 28, 1900, James S. Phelps commenced an action in the Circuit Court of Jefferson County, Kentucky, against the association, alleging that on July 8, 1885, he had made application for membership in it, and that on July 16, 1885, his application had been approved and certificate of policy of insurance issued to him. Breaches of the agreement on the part of the defendant were alleged, and a judgment asked for $1,994.20. A summons was issued and served on the insurance commissioner, and an alias summons was also issued and served upon Ben Frese, as the managing agent and chief officer and agent of the association in Jefferson County. The defendant appeared specially and moved to quash the service on each summons. The motion was heard on affidavits and overruled. The defendant taking no further action, judgment was rendered on May 19, 1900, in favor of the plaintiff and against it for $1,994 with interest.

On August 4, 1900, the plaintiff filed an amended and supplemental petition, in which he alleged the filing of the original petition, the judgment, the issue of execution, a return of *nulla bona;* that the defendant had a large number of policy holders in the State who at stated times and regular intervals became indebted to it for premiums and assessments upon its policies of insurance, and prayed for a general attachment, or in lieu thereof the appointment of a receiver to take charge of the business and property of the defendant in Kentucky, and that all revenues and income accruing to it from policy holders and other debtors be ordered paid to the receiver. Upon the filing of this amended and supplemental petition the court appointed the Fidelity Trust and Safety Vault Company, the other appellee, hereinafter called the company, a receiver of all the property of the defendant in Kentucky, directed it to receive and collect all moneys and debts now owing or hereafter to accrue to the said defendant, and ordered all debtors of the association to pay to the receiver all premiums and assessments which might become due or owing to it; such receivership to continue until the judgment of the plaintiff and all costs and expenses had been paid, and then to terminate. The company qualified as such receiver and gave notice to the policy holders of the defendant.

On August 22, 1900, the association applied by petition and bond for a removal of the case to the Circuit Court of the United States for the District of Kentucky, which application was denied. It does not appear that any copy of the record was filed in the Federal court. But it commenced this suit in that court against Phelps (the judgment creditor) and the company, to enjoin them from further proceeding under the order made by the State court. The court issued an injunction, as prayed for. (103 Fed. Rep. 515.) On February 2, 1901, the defendants moved to dissolve the injunc-

tion, which motion was overruled and an appeal taken to the United States Circuit Court of Appeals for the Sixth Circuit. By that court the decision of the Circuit Court was reversed February 4, 1902, (50 C. C. A. 339; 112 Fed. Rep. 453,) and the case remanded with directions to dismiss the bill of complaint. From such decree the association appealed to this court.

Mr. Justice BREWER delivered the opinion of the Court.

Many questions were elaborately discussed by counsel both orally and in brief, but we are of the opinion that the decisions of two or three will dispose of the case. First, the service of summons on the insurance commissioner was sufficient to bring the association into the State court as party defendant. It was stipulated between the parties that the outstanding policies existing between the association and citizens of Kentucky were continued in force after the action of the insurance commissioner on October 10, 1899, and that on said policies the association had collected and was collecting dues, premiums and assessments. It was, therefore, doing business within the State. (*Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 602.) The plaintiff was a citizen of Kentucky, and the cause of action arose out of transactions had between the plaintiff and defendant while the latter was carrying on business in the State of Kentucky under license from the State. Under those circumstances the authority of the insurance commissioner to receive summons in behalf of the association was sufficient. Such was the ruling of the Court of Appeals of Kentucky. (*Home Benefit Society of New York* v. *Muehl*, 22 Ky. Law. Rep. 1378; 59 S. W. Rep. 520.) In that case the society while doing business in the State issued the policy sued on, but in April, 1894, before the action was brought, ceased to do business and withdrew all of its agents. Service on the commissioner was held good. The court, in its opinion, after referring to the statute of 1870 and the change made by section 631, under which this service was made, said (p. 1379):

"It is sufficient to say that the agency created by the act of 1893 is, in its terms, broader than that created by the act of 1870. The words of the later statute express no limitation. Whatever limitation shall be applied to it must be by implication. And when we consider the purpose of the act it becomes clear that it would be frustrated by the construction contended for. There is no need of the right to serve process upon the insurance commissioner so long as the company has agents in the State, and we think the purpose of the section was to provide a means of obtaining service of process upon foreign companies which no longer had agents in the State upon whom process might be served in suits upon contracts made in this State, whatever may be held as to suits upon contracts entered into elsewhere." See also *Germania Ins. Co.* v. *Ashby*, (23 Ky. Law Rep. 1564.)

Such decision of the highest court of Kentucky, construing one of its own statutes, if not controlling upon this court, is very persuasive, and it certainly is controlling unless it be held to be merely an interpretation of a contract created by the statute. As an original question, and independently of any expression on the part of the Court of Appeals, we are of the opinion that such is the true construction. This and other kindred statutes enacted in various States indicate the purpose of the State that foreign corporations engaging in business within its limits shall submit the controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek the State in which the corporation has its home for the purpose of enforcing his claims. Many of those statutes simply provided that the foreign corporation should name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the State leaves the corporation without any person upon whom process can be served. In order to remedy this defect some States, Kentucky among the number, have passed statutes, like the one before us, providing that the corporation shall consent that service may be made upon a permanent official of the State, so that the death, removal or change of officer will not put the corporation beyond the reach of the process of the courts. It would obviously thwart this purpose if this association, having made, as the testimony shows it had made, a multitude of contracts with citizens of Kentucky, should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all these parties to seek the courts of New York for the enforcement of their claims. It is true in this case the association did not voluntarily withdraw from the State, but was in effect by the State prevented from engaging in any new business. Why this was done is not shown. It must be presumed to have been for some good and sufficient reason, and it would be a harsh construction of the statute that, because the State had been constrained to compel the association to desist from engaging in any further business, it also deprived its citizens who had dealt with the association of the right to obtain relief in its courts. We conclude, therefore, that the service of summons on the insurance commissioner was sufficient to bring the association into the State court, and there being nothing else to impeach the judgment it must be considered as valid.

Again, the proceeding for the appointment of a receiver was not a new and independent suit. It was not in the strictest sense of the term a creditor's bill. It did not purport to be for the benefit of all creditors, but simply a proceeding to enable the plaintiff in the judgment to obtain satisfaction thereof, satisfaction by execution at law having been shown to be impossible by the return of *nulla bona*. It is what is known as a supplementary proceeding. It is a proceeding known to the jurisprudence of many States, and one whose validity in those States has been recognized by this court.

(*Williams* v. *Hill*, 19 How. 246; *Atlantic & Pacific Railroad Company* v. *Hopkins*, 94 U. S. 11; *Ex parte Boyd*, 105 U. S. 647; *Street Railroad Company* v. *Hart*, 114 U. S. 654.) It is recognized in some cases in Kentucky. (*Well* v. *Deposit Bank*, 18 Ky. Law Rep. 156; *Caldwell* v. *Deposit Bank*, 22 Ky. Law Rep. 684.) This proceeding was treated by the State court as one merely supplemental in its character. It was initiated by the filing of an amended and supplementary petition. It was a mere continuation of the action already passed into judgment, and in aid of the execution of such judgment. As such it was not subject to removal to the Federal court, the time therefor prescribed by the statute having passed. (24 Stat. 554; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673–684.) Being a mere continuation of the action at law, and not removable to the Federal court, the latter had no jurisdiction to enjoin the proceedings under it. It is contended that such a supplementary proceeding is not warranted by the laws of Kentucky; that there is no statute of that State justifying it. But it has been sanctioned by the judgment of the court in which the proceeding was had, and cannot be treated by the Federal courts as unauthorized. (*Laing* v. *Rigney*, 160 U. S. 531.) See also *Leadville Coal Co.* v. *McCreery*, (141 U. S. 475, 478.) If not warranted by the law of the State relief must be sought by review in the appellate court of the State, and not by collateral attack in the Federal court.

For these reasons we think the decision of the Court of Appeals of the Sixth Circuit was right, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.